

**From:** [Bob Wright](#)  
**To:** [comment\\_rulemakingprocess@DeltaCouncil](mailto:comment_rulemakingprocess@DeltaCouncil)  
**Cc:** [Katy Cotter](#); [Corey Gibson](#); [John Carlson](#)  
**Subject:** Rulemaking Package Comment letter attached  
**Date:** Thursday, January 24, 2013 2:20:22 PM  
**Attachments:** [1\\_24\\_13\\_DP\\_regs\\_comment\\_ltr.pdf](#)

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Cindy Messer, Delta Stewardship Council and Council Members:

Attached please find a copy of my four page comment letter dated January 24, 2013 on the Regulations and rulemaking Package for the Record . So as to not confuse anyone, this is an identical copy of the comment letter that I referred to in my oral comments at the Public Hearing this morning and then supplied for the Record in hard copy to Angela of the Council Staff.

As I say in the letter, you are welcome to call me with any questions you may have.

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To protect and restore California Rivers by influencing public policy and inspiring citizen action.

## **FRIENDS OF THE RIVER**

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January 24, 2013

Cindy Messer  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Re: Comments on Proposed Delta Plan Rulemaking Package (Regulations) ***Including Proposed Amendments***

Dear Ms. Messer and Council Members:

This organization, Friends of the River, objects to approval of the Delta Plan (DP), RDPEIR, and Regulations. We adopt and incorporate by this reference our prior comment letters of January 11 and 14, 2013, and the Environmental Water Caucus comment letter of January 14, 2013. We do propose the following amendments to your Proposed Regulations that we believe would resolve our objections to your actions and would also allow your actions to comply with CEQA:

### **Proposed Amendments**

#### **§5007. Update Delta Flow Objectives.**

**[Retain subsections (a) and (b) from 11/16/12 Draft]**

**[Delete Subsections (c) and (d) in 11/16/12 draft, and replace with new subsections (c) and (d) as shown below].**

**[New subsection (c)]**

(c) In the absence of development of new and updated flow objectives for the Delta and high-priority tributaries including public trust doctrine analysis by the State Water Resources Control Board (Board); in the absence of the “comprehensive review and analysis” including “a reasonable range of flow criteria, rates of diversion, and other operational criteria. . . and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring

fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses”, “a reasonable range of Delta conveyance alternatives, including through-Delta”, “the potential effects of climate change, possible sea level rise up to 55 inches,”, “the potential effects on migratory fish and aquatic resources”, and the “potential effects of each Delta conveyance alternative on Delta water quality” (Draft EIR 23-3, 4) supposedly to be provided in the future by the BDCP CEQA process; and in the absence of water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required by CEQA as determined by the California Supreme Court’s decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412; it is not possible at this time for the Council to lawfully call for, plan for, encourage, recommend, or require development of new conveyance upstream from the Delta for the exporters. Sufficient analysis including CEQA and public trust doctrine analysis has not been performed to be able to lawfully select an alternative at this time calling for development of new upstream conveyance as opposed to continuing through-Delta conveyance and/or reducing exports.

**[New subsection (d)]**

(d) These Regulations and the Delta Plan do not call for, plan for, encourage, recommend, or require development of new conveyance, intakes, tunnels, canals and/or diversions upstream from the Delta for the exporters, improved Delta conveyance and operations, or optimizing diversions in wet years when more water is available. Nothing in these Regulations and the Delta Plan, or the draft EIR or RPDEIR establishes support for any future decision including but not limited to the BDCP process to favor selection of an alternative of development of new conveyance and diversions upstream from the Delta for the exporters as opposed to the alternatives of maintaining through-Delta conveyance and/or reducing exports. This provision is imperative to ensure that the Delta Plan and these Regulations do not violate CEQA and/or lead to development of or creation of momentum for a project or projects that will or may further degrade Delta water quality prior to comprehensive CEQA analysis, and prior to development of new and updated flow objectives for the Delta and high-priority tributaries including public trust doctrine analysis by the Board. This subsection and subsection (c) of this Section control over any provision or provisions in these Regulations, Delta Plan, Draft EIR and/or RPDEIR in actual or arguable conflict with this subsection and/or subsection (c) of this Section.

## **§5001. General Definitions.**

(e)(1)(A)

**Delete** “expand storage, and improve Delta conveyance and operations.”

(e)(1)(C)

**Delete** entire subsection including but not limited to the calls for “improving conveyance” and “to optimize diversions in wet years.”

### **Support for Proposed Amendments**

Our previous comment letters and the Environmental Water Caucus comment letter referenced at the beginning of this comment letter establish the numerous violations of CEQA that will take place if the Council proceeds to adopt the Delta Plan and Regulations including calls for improved, meaning new, upstream conveyance. Our Proposed Amendments to Section 5007 are intended to allow you to comply with, as opposed to violate, CEQA if you proceed to adopt the Regulations and Delta Plan at this time. The Council’s own Initial Statement of Reasons (SOR) furnishes additional support for the need to either not adopt the Regulations and Delta Plan at this time, or include our Proposed Amendments if the Regulations and Delta Plan are adopted. The SOR includes statements that “The best available science suggests that the currently required flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem. Additionally, uncertainty regarding future flow objectives for the Delta impairs the reliability of water supplies that depend on the Delta or its watershed. The predictability of water exports cannot be improved and the Bay Delta Conservation Plan cannot be implemented without timely State Water Resources Control Board (SWRCB) action to update flow objectives. Section 5007 is intended to achieve the legislative intent for the SWRCB to establish an accelerated process to determine instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan (Water Code section 85086).” (SOR pp. 5-6).

Those statements appear to be both clear and indisputable. That being the case, it would be directly contrary to those statements to proceed now to make planning decisions calling for or facilitating new, upstream conveyance for the exporters. No such planning decisions can be considered rationally, let alone made, until *after* the Board makes the determinations which the Council’s own Statement of Reasons declares are essential to the making of such planning decisions. To do otherwise “would put the cart before the horse.”

Our Proposed Amendments to the definitions in Section 5001, are intended to remove planning decisions calling for improved, meaning new, conveyance made in the guise of definitions. The most important and fundamental planning decision made in the history of the Delta will be whether or not to develop massive, new upstream conveyance from the Delta, for

the benefit of the exporters and to the detriment of the Delta. That is a planning decision that can only be considered rationally, let alone made, after comprehensive CEQA analysis and public trust doctrine analysis have been performed, and not made at the outset in the guise of being called “definitions”.

Please call if you have any questions about our comments.

Sincerely,

/s/ E. Robert Wright

E. Robert Wright

Senior Counsel